



INTERIOR BOARD OF INDIAN APPEALS

Estate of Donald Arthur Michell

28 IBIA 190 (09/13/1995)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF DONALD ARTHUR
MICHELL

: Order Affirming Order in Part, Vacating
: Order in Part, and Remanding Matter
: to Administrative Law Judge
:
: Docket No. IBIA 94-102
:
: September 13, 1995

This is an appeal from a March 2, 1994, order issued by Administrative Law Judge Keith L. Burrowes, in which he denied rehearing in the estate of Donald Arthur Michell, Flathead Allottee 3048 (decedent), IP BI 253A 86. Appellant is Michael A. Michell, one of four beneficiaries under decedent's will.

On September 21, 1987, Judge Burrowes issued an order approving decedent's will. The final paragraph of the 1987 order stated:

Any property in this estate, including that reflected on a separate inventory and appraisal of trust property located on the Blackfeet Indian Reservation, * * * dated April 23, 1986, which would otherwise escheat to the tribe under the provisions of the Indian Land Consolidation Act[, 25 U.S.C. § 2206,] shall not be distributed by this order, but shall be retained in this estate pending a further order herein.

On March 16, 1993, Judge Burrowes issued a notice and order of final distribution in which he held that the property identified in the final paragraph of the 1987 order should escheat to the Blackfeet Tribe. On July 9, 1993, he issued a modification order, adding decedent's interests in three allotments on the Crow Reservation to the inventory of decedent's estate and finding that the interests should escheat to the Crow Tribe. Appellant filed petitions for rehearing of both orders.

On March 2, 1994, judge Burrowes denied both petitions. He denied the petition for rehearing of the July 9, 1993, order as untimely and the petition for rehearing of the March 16, 1993, order on the merits.

43 CFR 4.241(a) provides that a petition for rehearing must be filed within 60 days of the date on which notice of the decision was mailed to the interested parties. Judge Burrowes' July 9, 1993, order was mailed to the parties on July 9, 1993. Appellant's petition for rehearing of that order was mailed on September 9, 1993, more than 60 days after July 9, 1993. The petition was therefore untimely.

Judge Burrowes March 2, 1994, order is affirmed insofar as it concerns the July 9, 1993, order.

Because of the disposition just made with respect to the July 9, 1993, order, appellant's arguments on the merits may be considered only insofar as they relate to the March 16, 1993, order. The Board finds that it is not necessary to address all of those arguments.

25 U.S.C. § 2206 provides: "Where the fractional interest [subject to escheat] has earned to its owner less than \$100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning \$100 in any one of the five years following the death of the decedent." Appellant contends that he was not given an opportunity to rebut this presumption.

In Estate of Guadalupe Almanza Conger, 21 IBIA 244, 249 (1992), the Board held that

with respect to any estate in which interests are presumed to escheat under [25 U.S.C. § 2206], evidence must appear in the probate record showing that (1) the Administrative Law Judge informed individuals who would otherwise inherit the interests that they have the right to attempt a rebuttal of the presumption, and (2) such individuals were provided with an opportunity to exercise their right of rebuttal.

See also Estate of Clarence Wilson, 22 IBIA 33 (1992).

In this case, the notice of the May 5, 1987, hearing stated:

SPECIAL NOTICE: Further notice is given to all heirs and/or devisees and all tribal entities filing inventories that some or all of said land interests may not be distributed to the heirs and/or devisees but rather be subject to divestiture by escheat to said tribe or tribes pursuant to the Indian Land Consolidation Act (96 Stat. 2215, 25 USC 2206) and any amendments.

Although the notice informed the heirs and devisees that decedent held interests subject to escheat, it did not inform them of their right to attempt to rebut the presumption of escheat. Nothing in the record shows that parties were advised of this right or given an opportunity to attempt a rebuttal. It is possible that the parties were given notice of this right at the hearing itself. However, no transcript of the hearing was prepared and, in the absence of a transcript, appellant must be given the benefit of any doubt. The Board finds that the parties were not advised of their right to attempt to rebut the presumption of escheat. Therefore, this matter must be remanded to Judge Burrowes.

On September 5, 1995, the United States Court of Appeals for the Ninth Circuit held that 25 U.S.C. § 2206, as amended in 1984, is unconstitutional. Youpee v. Babbitt, No. 94-35415 (9th Cir. Sept. 5, 1995). The interests at issue in this case, which are located on the Blackfeet Reservation, are within the jurisdiction of the Ninth Circuit Court of Appeals. Therefore, on remand, Judge Burrowes should take the decision in Youpee into consideration.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Burrowes' March 2, 1994, order is affirmed insofar as it denied rehearing of his July 9, 1993, order; vacated insofar as it denied rehearing of his March 16, 1993, order; and remanded to him for further proceedings concerning those interests an lands on the Blackfeet Reservation that were addressed in the March 16, 1993, order.

//original signed

Anita Vogt
Administrative Judge

//original signed

Kathryn A. Lynn
Chief Administrative Judge